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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JORDAN,

Defendant and Appellant.

B188834

(Los Angeles County
Super. Ct. No. YA057956)

APPEAL from a judgment of the Superior Court of Los Angeles County. John V. Meigs, Judge. Modified in part and affirmed in part.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth N. Sokoler and Marc E. Turchin, Deputy Attorneys General, for Plaintiff and Respondent.

In a court trial, the trial court found Edward Jordan (defendant) guilty of three counts of assault by means of force likely to produce great bodily injury and with a deadly weapon and of petty theft with a prior conviction of a theft-related offense. (Pen. Code, §§ 245, subd. (a)(1), counts 1, 3 & 4; 666, count 2.)¹ With respect to the current convictions, the trial court made findings that defendant inflicted great bodily injury during the assault in count 1 (§ 12022.7, subd. (a)) and that the current convictions constituted serious felonies because of the use of a box cutter (§ 1192.7). As to the prior conviction allegations, the trial court made findings that defendant had two prior convictions of a serious felony requiring five-year enhancements (§ 667, subd. (a)(1)), that he had three serious felony convictions that required sentencing pursuant to the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and that he had served five separate prison terms for a felony (§ 667.5, subd. (b)).

He appeals from the judgment and contends that the trial court improperly failed to grant his *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).)

The Attorney General contends that there is sentencing error requiring a remand because the record demonstrates that the trial court failed to properly impose or strike the eight section 667.5, subdivision (b), separate prison term enhancements.

We find the contentions to be unpersuasive. However, the People's contention requires that we modify the judgment by indicating that the trial court properly made six findings of a prison term enhancement pursuant to section 667.5, subdivision (b), and that the six findings are stricken from the judgment. In all other respects, we will affirm the judgment.

THE FACTS

Defendant does not assert that the evidence is insufficient. Consequently, we state the facts briefly. On March 16, 2004, defendant entered an Inglewood Rite Aid store and stole merchandise. Loss prevention agents Alejandro Delgadillo and Jason Parker

¹ All further statutory references are to the Penal Code unless otherwise indicated.

apprehended defendant and accompanied him to the store's stockroom. While Delgadillo and a female loss prevention agent prepared some paperwork, Parker returned to the store. In the stockroom, defendant grabbed Delgadillo and cut him across the neck with something, and Delgadillo realized that he was bleeding. Defendant held up a small razor blade to the female loss prevention agent, and she opened the storeroom door to let him out. Defendant ran out of the store, and Parker followed in pursuit. During the pursuit, defendant turned and hit Parker on the head. Bystanders came to Parker's assistance. Parker saw what turned out to be a box cutter in defendant's hand. Defendant was arrested. Delgadillo suffered a serious laceration to his neck that at the time of trial still left him numb. Parker had a cut to his head for which a doctor recommended stitches, but he declined medical treatment.

In defense, defendant admitted the theft and that he cut Delgadillo. However, he denied threatening the female agent with the box cutter and hitting or cutting Parker.

DISCUSSION

I. The *Marsden* Claim

Defendant contends that the trial court should have granted his *Marsden* motion. We disagree.

A. *Background*

On July 1, 2004, defendant was arraigned on the information. Initially, he was represented by a deputy public defender. On January 11, 2005, the deputy public defender declared a conflict of interest. The Los Angeles County Office of the Alternate Public Defender was appointed. On June 2, 2005, defendant raised complaints about his deputy alternate public defender. The trial court held a *Marsden* hearing.

During the hearing, defendant complained that he felt compelled to enter into a jury waiver because of the inadequacies of his trial counsel. Defendant said that he made three attempts to schedule a jail interview with trial counsel. He wanted to discuss "a development strategy best suited" for his defense. Trial counsel "failed to appear." Defendant said, "I respectfully request this court to open the eyes of justice and witness

its shallow and naked truth the absence of [an affirmative] defense is not -- it's not present." The trial court replied that it did not understand the complaint.

Defendant said, ". . . [W]itness the absence of an affirmative defense." Defendant then explained that he had waived time for 120 days. Although trial counsel repeatedly promised a conference on his case, there was none. The case was postponed nine months awaiting disposition. During the initial nine months, his deputy public defender explained the case to him in a particular way. She kept telling him that the prosecutor would not make a plea offer until he had an adequate opportunity to look into the prior convictions. Defendant had agreed to the continuances. Then the conflict of interest was declared. Trial counsel's replies to his inquiries about his case were evasive and equivocal. Also, defendant failed to understand, if there was a conflict of interest with one public defender's office, why the other public defender's office also was not disqualified.

The trial court explained to defendant that the Los Angeles County public defender offices were not one and the same office. The deputy public defender had no legal obligation to explain to defendant or to the trial court the reason underlying the declaration of a conflict of interest.

The trial court asked whether defendant's complaint boiled down to a complaint that his trial counsel had not met with him to discuss a strategy for the trial. Defendant replied in the affirmative. The trial court asked defendant to be more specific. Defendant informed the trial court that he had used the information he had obtained about his case from former counsel to question trial counsel. Defendant was uncomfortable with trial counsel's replies; they were "evasive, shallow, [and] equivocal." He said, "[I]t just don't build up to I have your best interest at heart." He complained that even after four to five months of representation, there had been no interview.

The trial court inquired into trial preparation. Trial counsel said that he had obtained the surveillance videotape from the prosecutor and the section 969b prison packet. Trial counsel was off work for a while, and another deputy had taken over

defendant's representation. Trial counsel never had visited defendant at the county jail. Trial counsel had utilized defendant's courtroom appearances for attorney-client conferences. Trial counsel had done his best to explain defendant's legal situation to him. In defendant's letter, defendant expressed concern over making a *Romero* motion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) Defendant had asked trial counsel some questions about the motion, and trial counsel had explained that it was better to bring such motion after conviction. Trial counsel was hopeful that at that time, the trial court would treat defendant as a second strike offender. Trial counsel had also explained that two serious felony convictions can properly arise from one case. As far as the store's video surveillance tape was concerned, trial counsel had watched it and had informed defendant that the quality of the videotape was poor. It was hard to tell what had gone on inside the stockroom.

The trial court inquired whether there was an affirmative defense, and trial counsel replied, "No." It asked whether an affirmative defense was discussed. Trial counsel acknowledged that he probably had not discussed the issue with defendant as there were no defense or independent witnesses. The trial court wanted to know whether the assaults occurred subsequent to the apprehension for the theft, and it ascertained that only store employees were present after apprehension. Trial counsel indicated that was the situation.

In response to inquires, trial counsel told the trial court that he had obtained all the discovery from former counsel, and no investigative report was included. He said that in his opinion, a further investigation in search of independent eyewitnesses was unnecessary. Former counsel had obtained an order for a psychological evaluation.

Defendant was asked by the trial court whether he wanted to add anything. Defendant disputed trial counsel's claim that trial counsel had discussed "certain things" with him. He said that if there was such a discussion, it was so indirect that he had missed it. Defendant wanted a jail visit so that he could point out that "the things that happened in the preliminary hearing are not as picture perfect as it seem[ed] when you

read the transcript.” Defendant complained that the prosecution witnesses’ claims were untrue. He said: “I don’t think with the person facing a life term in prison, I don’t think another person could honestly say I have your best interest at heart and not even take time to come, you know, tell you to go to hell, not to mention, say hello. I just don’t see how the frame fits in that picture of I got your best interest at heart.”

The trial court wanted to know why defendant had not raised these complaints earlier, on May 13, 2005. Defendant responded that he had wanted to submit his complaints in a letter.

The trial court read defendant’s letter.

In the letter, defendant reiterated his oral complaints. He also said that his trial counsel had a lackadaisical attitude and interest in his case and that trial counsel had been evasive and equivocal in response to his questions about the *Romero* procedure and the 969b prison packet.

The trial court inquired if there was anything further, and defendant said, “That’s it.”

The trial court denied the *Marsden* motion. It commented that it could understand defendant’s frustration at not knowing the reason for the conflict of interest. However, trial counsel was correct about the most effective way to approach the trial court on a *Romero* motion. It said that trial counsel was the most experienced lawyer in the courthouse, having practiced some 25 years. While it understood defendant’s concerns as he was facing a life term, defendant’s “bad feelings” and his expectations that trial counsel would spend more time with him did not justify a substitution. Certainly, counsel’s trial preparation could not be faulted.

B. The Analysis

People v. Roldan (2005) 35 Cal.4th 646, 681, recently summarized the principles that apply: ““When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the

attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would ‘substantially impair’ the defendant’s right to effective assistance of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)”

Applying these principles to defendant’s motion, the trial court did not abuse its discretion in denying defendant’s *Marsden* motion. Defendant was given ample opportunity to present his reasons for seeking new counsel. None of these reasons reflected incompetence or a conflict of interest justifying replacing appointed counsel. “[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence” (*People v. Cole* (2004) 33 Cal.4th 1158, 1192), nor was there a conflict of interest. On a simple case such as defendant’s, trial counsel’s mere use of courtroom conferences with defendant failed to demonstrate a reason for changing counsel. Trial counsel’s trial preparation showed that he had done everything reasonably required to prepare for the upcoming trial. As the trial court commented, counsel’s trial preparation was flawless. Nothing that occurred during trial demonstrated that trial counsel was unprepared for trial or was constitutionally ineffective.

Defendant argues that there was *Marsden* error because the trial court evaluated trial counsel’s performance solely on the basis of its courtroom observations of counsel’s performance without listening to defendant’s specific complaints of misconduct. (See *Marsden, supra*, 2 Cal.3d at pp. 123-124; *People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) Defendant mistakes his record. Here, apparently to bolster defendant’s confidence in trial counsel, the trial court informed defendant that he had experienced trial counsel.

Such reassurances do not demonstrate error. (See *People v. Huffman* (1977) 71 Cal.App.3d 63, 79.) The record shows that the trial court conformed its inquiry and ruling to *Marsden*'s requirements. It listened to all of defendant's complaints and had defendant explain the specifics of the complaints to it so as to obtain the facts underlying any valid complaints. Twice it asked defendant whether there was any further information to be considered before it ruled on the request for a substitution of counsel. It obtained trial counsel's explanations for his performance on the issues raised by defendant. The trial court delved in detail with respect to trial counsel's preparation in the case. The trial court was fastidious in making all the proper inquiries and obtaining all the relevant information before it ruled on defendant's motion.

Defendant also asserts that he and trial counsel were embroiled in such an irreconcilable conflict that ineffective representation was likely to result. Vague and unsubstantiated allegations of a lack of communication and that trial counsel did not have defendant's interests at heart do not show an insoluble impasse nor an irreconcilable conflict. (*People v. Hines* (1997) 15 Cal.4th 997, 1025-1026.) And, defendant's claimed lack of trust in or inability to get along with appointed counsel was also insufficient to require the substitution. (See *People v. Michaels* (2002) 28 Cal.4th 486, 523.) The record demonstrated that trial court properly exercised its discretion when it denied the *Marsden* motion.

II. The Section 667.5, Subdivision (b), Findings

In footnote 3 of respondent's brief, the Attorney General complains that the trial court found defendant had eight prison term enhancements, but at sentencing disposed of only five of those enhancements. Also, the trial court improperly imposed and stayed the terms for the five findings, in lieu of striking the findings as is required by the decision in *People v. Langston* (2004) 33 Cal.4th 1237, 1241.

During the court trial, the trial court found true the allegation in the information that defendant had eight prior felony convictions for which he had served a separate prison term. At sentencing several months later, trial counsel asked the trial court to

impose concurrent terms and an aggregate term of 38 years to life. The prosecutor recommended and the trial court imposed an aggregate term of 64 years 8 months. The aggregate term consisted of a 25 years-to-life term for the assault in count 1, enhanced by 3 years for the infliction of great bodily injury; a consecutive 8-month term (one-third of the middle term of 2 years) for the petty theft with a prior offense; a 25 years-to-life term for the assault in count 3; a consecutive 1-year term (one-third of the middle term of 3 years) for the assault in count 4; and two 5-year enhancements, or 10 years, for defendant's having suffered two prior serious felony convictions.

When the trial court finished sentencing defendant, the prosecutor reminded the trial court that it had found true five separate prison term enhancements. In response, the trial court imposed five 1-year enhancements for the separate prison term enhancements and ordered the one-year terms "stayed."

We considered the relevant trial and sentencing proceedings, as well as the trial court's minutes and the abstract of judgment. We conclude that it is impossible to tell from the record whether the trial court made eight true findings of separate prison term enhancements, or it made five such findings.

Despite the error, we decline to remand for a new trial on these allegations of prior convictions. The court trial's findings and sentencing proceedings disclose that the prosecutor did not recommend the use of these one-year enhancements as part of defendant's sentence. The trial court's comments during sentencing also show that the trial court had no intention of using the enhancements as part of the sentence. Two of the eight findings of having served a separate prison term were required to be stricken in any event as they were repetitive of the two findings of five-year serious felony enhancements. (*People v. Jones* (1993) 5 Cal.4th 1142, 1144-1152.) Defendant's criminal history as revealed by the probation report supports the finding of six separate prison term enhancements. The trial court and the prosecutor agreed that the use of the one-year enhancements was unnecessary as the aggregate term of 64 years 8 months provided ample punishment for defendant's criminal conduct.

To remand here would be to engage in a useless act. It is apparent that were we to reverse the findings in question and remand for a new trial, the trial court would merely make new findings and then strike all of its findings so that none of the one-year enhancements would be added to defendant's sentence. Accordingly, we conclude that in this case a proper disposition is to simply modify the judgment to effect the parties' and the trial court's intent by determining that the trial court properly made findings of six separate prison term enhancements pursuant to section 667.5, subdivision (b). Also, we will modify the judgment by ordering that the prison term enhancements be stricken (not stayed) in conformity with the decisions in *People v. Langston, supra*, 33 Cal.4th at page 1241, and *People v. Jones* (1992) 8 Cal.App.4th 756, 758.

DISPOSITION

The judgment is modified to provide for six findings of section 667.5, subdivision (b), enhancements for defendant's having served a separate prison term for a felony. These findings are ordered stricken pursuant to *People v. Langston, supra*, 33 Cal.4th at page 1241, and *People v. Jones, supra*, 8 Cal.App.4th at page 758. In all other respects the judgment is affirmed.

The superior court shall cause its clerk to make a correction in the minutes and the abstract of judgment showing the finding of six separate prison term enhancements and that these enhancements were stricken during the sentencing proceedings.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ